January 4, 2011

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket 10-71

Dear Chairman Genachowski:

We write to express our appreciation that you intend to begin a Notice of Proposed Rulemaking to reform the retransmission consent rules to protect consumers. Since 14 companies, trade associations and public interest groups first submitted a rulemaking petition in this docket in March 2010, the American public has been caught between broadcasters and multi-channel video programming distributors (MVPDs) several more times in their battles over retransmission consent agreements. We write to reemphasize that the Commission has clear authority to act in this docket, both to enforce the "good faith" requirement and fulfill the Commission's responsibility to ensure that fees for retransmission consent do not unreasonably raise the basic rate consumers pay for cable.

As we have repeatedly seen, the Commission's current actions and rules are insufficient to protect members of the public from losing access to important and popular programming. The Commission has the power under its existing rules to influence these negotiations and moving forward to a notice of proposed rulemaking, and ultimately a new and stronger rule, will discourage parties from causing further harm to the public.

The Commission has Existing Authority to Enforce Good Faith Negotiations

When Congress established the obligation for broadcasters and MVPDs to negotiate in good faith, it simultaneously gave the Commission authority and the obligation to ensure that parties do so.[1] In 2000, the Commission acted pursuant to its authority and obligation under section 325(b)(3)(C)[2] to require broadcasters to negotiate in good faith in retransmission consent

[1] 47 U.S.C. § 325(b)(3)(C) ("The Commission shall . . . revise the regulations governing the exercise by the television broadcast stations of the right to grant retransmission consent . . . . Such regulations shall . . . prohibit [broadcasters and MVPDs] from engaging in exclusive contracts for carriage or failing to negotiate in good faith.").

[2] Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, § 1009(a)(2), 113 Stat. 1501, 1501A-538 (codified at 47 U.S.C. § 325(b)(3)(C)). Congress created a similar obligation for multi-channel video programming distributors in 2005, Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 207(a)(5), 118 Stat. 2809, 3428 (codified as amended at 47 U.S.C. § 325(b)(3)(C)(iii)), which the Commission implemented by extending its existing good faith regulation to MVPDs. *Implementation*

negotiations.[3] As recently as last year, Congress has reaffirmed this authority by extending the authority-granting statute until January 1, 2015.[4] The Commission's enforcement power in this area, unfortunately, has been artificially limited by the Commission's own rules.

The Commission's own good faith negotiation regulations permit a broadcaster or MVPD that believes the other party in a retransmission consent negotiation has failed to negotiate in good faith to file a complaint initiating an adjudicatory proceeding at the Commission "to obtain enforcement of the rules."[5] The Commission's existing rules enumerate seven practices that violate the parties' duty to negotiate in good faith.[6] These detailed rules go a long way toward showing with specificity if a party to a retransmission consent agreement is not negotiating in good faith and provides substantial clarity to the parties about what behavior is acceptable and what is not.

Even more relevant, in its 2000 Order implementing the Satellite Home Viewer Improvement Act of 1999, the Commission also reserved its authority under section 503 to impose forfeiture penalties on parties that willfully and repeatedly fail to comply with its regulations.[7] Section 503 authorizes the Commission to impose forfeiture penalties of up to $25,000 per day for repeated violations of "any rule, regulation, or order issued by the Commission."[8]

Since the 2000 Order, the Commission has found a violation of the good faith standard only once, and has *never* enforced a forfeiture penalty.[9] In the one case where the Commission did act, the Media Bureau required only resumption of negotiations within ten days and status

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of Section 107 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Report and Order, MB Docket No. 05-89 (2005).

[3] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445 (2000).

[4] *Implementation of Section 1003(b) of the Department of Defense Appropriations Act, 2010*, Final Rule, 74 Fed. Reg. 69,285-01, 69,285-86 (2009) (tying expiration of the good faith obligation regulation to its statutory authorization in 47 U.S.C. § 325(b)(3)(C)). Congress later extended the statutory authorization until January 1, 2015 in the Satellite Television Extension and Localism Act of 2010. Pub. L. No. 111-175, § 202(2), 124 Stat. 1218, 1245.

[5] 47 C.F.R. § 76.65(c).

[6] These are: (1) refusal to negotiate; (2) refusal to designate a representative with authority to bind the entity in a retransmission consent agreement; (3) refusal to meet at reasonable times and locations or unreasonably delaying negotiations; (4) refusal to put forth more than one unilateral proposal; (5) failure to respond to the other party's proposal; (6) prohibiting the other party from entering into retransmission consent agreements with any other broadcaster or MVPD; and (7) refusing to secure a written agreement setting forth the understanding of the parties. 47 C.F.R. § 76.65(b)(i)-(vii). In addition, a complaining party can demonstrate that a failure to negotiate in good faith may be shown under the totality of the circumstances of the negotiation. *Id.* at § 76.65(b)(2).

[7] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. at 5480, ¶ 82 (2000).

[8] 47 U.S.C. § 503(b)(2)(A).

[9] Letter to Jorge L. Bauermeister, 22 FCC Rcd. 4933 (2007).

reports every thirty days, despite the fact that the cable operator in question made a significant claim that was never supported with any evidence. The Bureau did not require the parties to enter into any formal dispute resolution mechanism.[10]

The Commission has not used the regulations it already has to protect the public when negotiations break down, despite its statutory obligation to protect consumers. While it is certainly likely that the Commission would prefer forfeiture authority of greater amounts to have a more pronounced impact on these negotiations, failure to use the authority at all sends a debilitating message to parties that might otherwise choose to comply with their good faith obligation.

The Commission Possesses Authority to Grant the Pending Petition

In March of last year, Public Knowledge, New America Foundation, and twelve other entities filed a petition for rulemaking asking the Commission to update its retransmission consent rules to reflect the changes in the multi-channel video marketplace in the last twenty years.[11] We believe the Commission has ample authority to grant our request.

To start, the fundamental purpose of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act") is "to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service."[12] It is important to keep this goal in mind, as the impact of modern-day retransmission consent negotiations is to permit broadcasters to exploit their statutory protections to increase prices for consumers of video programming, in direct contradiction to this goal.

Beyond the overarching goal of the statute, the Commission is specifically obligated to protect consumers from high cable rates that might arise as a result of retransmission consent negotiations. Section 325(b)(3)(A) requires the Commission to "govern the exercise by television broadcast stations of the right to grant retransmission consent . . . and of the right to signal carriage,"[13] and also requires the Commission to "consider …the impact that the grant of

[10] In that case, Choice Cable T.V. ("Choice") had halted negotiations with the WLII/WSUR Licensee Partnership ("WLII"), telling the station that Choice had obtained WLII's programming through an agreement with its booster station WORA-TV, but never produced any evidence of such agreement. The Media Bureau, acting under delegated authority from the Commission, held that such behavior violated Choice's obligation to negotiate in good faith. As a remedy, the Media Bureau ordered Choice to contact WLII within ten days to begin negotiating for retransmission consent again, to negotiate in good faith, and to update the Commission every thirty days on the progress of the negotiations. *Id.* at 4933-34.

[11] Public Knowledge, *et al.*, Petition for Rulemaking to Amend the Commission's Rules for Retransmission Consent, MB Docket 10-71 (filed March 9, 2010).

[12] S. REP. NO. 102-92, at 1 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1133.

[13] 47 U.S.C. § 325(b)(3)(A).

retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that . . . the rates for the basic service tier are reasonable."[14]

In the Senate Report accompanying the legislation, Congress noted that, while retransmission consent rights may increase the costs of cable operators, "the Committee intends for the FCC to ensure that these costs do not result in excessive basic cable rates."[15] The report specifically stated the bill "requires" the Commission to adopt regulations aimed at curbing companies' market power and addressing technical and technological issues.[16]

The Commission has acknowledged the importance of this portion of section 325(b)(3)(A) and has not formally construed its power to be limited to the enforcement of good faith negotiations. The provision was first interpreted by the Commission in its 1993 Order implementing the 1992 Act.[17] Notably, while the Commission declined to regulate retransmission rates at the time,[18] the Commission did *not* find that it lacked authority to regulate retransmission consent rates, much less that it lacked statutory authority to ensure that the marketplace in which those rates are negotiated was operating efficiently.[19] In fact, in that proceeding's Notice of Proposed Rulemaking, the Commission acknowledged outright that "[t]he statute requires that our rules ensure reasonable rates for the basic service tier."[20]

In declining to regulate retransmission consent rates in 1993, the Commission explained that the record at that time provided no evidence that retransmission consent negotiations would have a significant effect on consumer rates for the basic cable service tier.[21] Seventeen years later, however, the Commission has been presented with ample evidence that abuse of the retransmission consent regime adversely impacts rates for the basic service tier.[22] The

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[14] 47 U.S.C. §§ 325(b)(3)(A), 543(b)(1).

[15] S. REP. NO. 102-92, at 74 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1207.

[16] *Id.* at 1, *reprinted in* 1992 U.S.C.C.A.N. at 1133-34.

[17] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, MM Docket No. 92-259 (Mar. 11, 1993).

[18] In 1996, the Commission's direct ratemaking authority was altered, but it did not impact the Commission's authority and responsibilities under § 325. Telecommunications Act of 1996, Pub. L. No. 104-104, Title III, § 301(b), (c), (j), (k)(1), 110 Stat. 56, 114, 116, 118 (amending 47 U.S.C. § 543).

[19] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, MM Docket No. 92-259 (Mar. 11, 1993).

[20] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, MM Docket No. 92-259 at ¶ 31 (Dec. 24, 1992).

[21] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, MM Docket No. 92-259 at ¶ 178 (Mar. 11, 1993).

[22] *See* Comments of American Cable Ass'n, *2010 Quadrennial Review*, MB Docket No. 09-182 (filed July 12, 2010), at 11-19; Michael L. Katz, Jonathan Orszag & Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, Nov. 12, 2009, attached to the Comments of the National Cable & Telecommunications Association, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269 (filed Dec. 16, 2009), at 30; *see also* Clarus Research Group, *Impact of Retransmission Consent Costs on Members*

Commission now has information directly from MVPDs, explaining that the broken retransmission consent regime directly results in higher carriage fees for MVPDs, which are inevitably passed on to consumers.[23] The Commission should act upon this developed record and adopt the proposed rules to limit additional harm to consumers.

In addition to the specific mandates of section 325, the Commission has long had broad authority to ensure that broadcasters, in exchange for access to the airwaves, live up to their obligations as public trustees.[24] By means of its exclusive control over broadcast licenses, and its requirement to consider the public interest, convenience, or necessity in taking action,[25] the Commission is invested with "enormous discretion" to regulate broadcasters according to its conception of the public interest.[26] The 1992 Act, which established the must-carry and broadcast-consent provisions, also underscored the public interest in cable carriage of broadcast signals. The Act emphasized the government's "substantial interest in having cable systems carry the signals of local commercial television stations,"[27] and announced a Congressional policy to "promote the availability to the public of a diversity of views and information through cable television."[28] The Commission would be well-justified to rely on these provisions to conclude that broadcast signals should be carried on in interim basis while retransmission consent is being negotiated.

Section 325(b)(1) Does Not Prohibit the Commission from Exercising Its Authority Through Interim Carriage or Arbitration Regulations

Some parties have argued that section 325(b)(1) of the Act prevents the Commission from acting to protect consumer in the retransmission consent marketplace.[29] This assertion, however, is

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of the American Cable Association, May 2009, at question 3 (filed as an attachment to the Comments of the American Cable Association, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269 (filed May 20, 2009)).

[23] *See* Comments of American Cable Ass'n, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 at 19 (May 18, 2010) (noting that smaller cable operators pay more than twice the average retransmission consent fees paid by larger operators, and that in negotiations that include multiple "Big 4" stations in the same market, negotiated carriage fees are 20% higher than individually-negotiated agreements).

[24] *See, e.g., CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116-19 (1973), *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90 (1969), *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 227 (1943).

[25] Section 303 of the Act authorizes the Commission to take action here. Section 303(i) grants the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting." And section 303(r) imposes on the Commission the obligation to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Act]." 47 U.S.C. § 303.

[26] *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043, 1048-49 (7th Cir. 1992).

[27] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-356 at § 2(a)(9).

[28] *Id.* at § 2(b)(1).

[29] *See* 47 U.S.C. § 325(b)(1) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station . . . ").

based upon a misreading of the statute and is in blatant contradiction to Congress's intent in enacting section 325. Section 325(b)(1), when read correctly, only governs interactions *between broadcasters and MVPDs*, and does not limit *the Commission*'s authority to act under section 325 or any other relevant provision of the Act. By its plain language, the section does not at all prohibit the Commission from imposing interim carriage. Statutory silence does not divest the Commission of its express authority under sections 303 and 325 of the Act to order broadcasters to give temporary retransmission consent to an MVPD.[30] If Congress had intended to restrict the Commission's authority under section 325, it surely would have simply done so.[31] Indeed, the Commission itself has found that it possesses authority to order interim carriage even in the absence of the broadcaster's express authority under section 325(b)(1).[32] When the Commission is empowered with the authority to order temporary relief—such as sections 303 or 325, in the case of retransmission consent disputes—the Commission may act under that authority notwithstanding section 325(b)'s general consent requirement.[33]

Even beyond the plain meaning of the statute, Congress expressly contemplated the Commission's authority to do its job in the context of retransmission consent disputes as they drafted section 325. The provision's legislative history makes clear that Congress did not grant broadcasters retransmission consent rights as an end unto itself, but rather as part of a broader effort to promote programming access for the public. An essential component to this structure is the Commission's authority to step in if companies harm consumers in the name of protecting their own corporate interests. For example, when explaining the Commission's section 325 authority, Senator Inouye stated:

> I am confident, as I believe the other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers.[34]

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[30] *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 774 (6th Cir. 2008) (holding that "statutory silence . . . regarding the agency's rulemaking power" in one section of the Act "does not divest the agency of its express authority to prescribe rules" pursuant to another section of the Act).

[31] *Compare* 47 U.S.C. § 325(b) *with* 47 U.S.C. § 543(a)(1) ("No Federal agency . . . may regulate the rates for the provision of cable service except to the extent provided under this section and section 612.") *and* 47 U.S.C. § 543(e)(1) ("No Federal agency . . . may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts.").

[32] *See Emergency Petition of ABC, Inc. for Declaratory Ruling and Enforcement Order, or in the Alternative for Immediate Injunctive Relief*, Memorandum Opinion and Order, 15 FCC Rcd 7882 ¶ 7 (CSB 2000).

[33] *Id.*

[34] 138 Cong. Rec. S643 (Jan. 30, 1992); *see also* 138 Cong. Rec. S14615-16 (Sep. 22, 1992) (statement of Sen. Lautenberg) ("[I]f a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights . . . . [i]nstead, cable operators will have an opportunity to seek relief at the FCC."); Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30,

Section 325(b)(1) does not prevent the Commission either from utilizing interim carriage or mandatory arbitration when retransmission consent negotiations break down; in fact, both the language and legislative history of the statute demonstrate the Commission's obligation to so act,

The Administrative Dispute Resolution Act Does Not Prevent the Commission from Implementing Regulations to Protect the Public in Retransmission Consent Disputes

As the Commission itself has acknowledged, the Administrative Dispute Resolution Act ("ADRA") permits the Commission to implement mandatory arbitration to protect consumers. Section 4 of the ADRA states, in relevant part, that "[a]rbitration may be used as an alternative means of dispute resolution whenever all parties consent,"[35] and "[a]n agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit."[36] This provision, however, does not prevent the Commission from implementing mandatory arbitration regulations under its authority to protect consumers in the retransmission consent marketplace.

Indeed, under the Commission's own consistent interpretation of the ADRA, the language, structure, and legislative history of the statute all confirm that administrative agencies may impose mandatory arbitration, so long as that arbitration is subject to *de novo* review at the agency.[37] 5 U.S.C. § 580 establishes that an "arbitration" award is binding on the parties and may be enforced through sections 9-13 of the Federal Arbitration Act ("FAA").[38] However, 5 U.S.C. § 581(a) provides that a party aggrieved by a binding "arbitration proceeding" award may only seek review of the award on the very narrow grounds allowed by the FAA: corruption, fraud, undue means, evident partiality, or when the arbitrators exceeded their authority.[39] When drafting the ADRA, Congress specifically noted that it intended the arbitration provisions to be "read in tandem with the Arbitration Act which is codified in Title 9 of the United States Code and which provides the statutory framework for binding arbitration in the private sector and, in many respects, in ongoing federal programs."[40] Accordingly, arbitration awards with less stringent review standards do not fall within the scope of the ADRA's arbitration restrictions.

2007), attached as Exhibit A to Retransmission Consent Complaint, *Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.*, CSR No. 8233-C (filed Oct. 22, 2009) (explaining that section 325 "[a]t a minimum," means that "Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [resolution].").

[35] 5 U.S.C. § 575(a)(1).

[36] 5 U.S.C. § 575(a)(3).

[37] *TCR Sports Broad. Holding, LLP v. Time Warner Cable, Inc.*, Order on Review, DA Docket No. 08-2441, ¶ 52 (Oct. 30, 2008) (dismissing party's assertion that Commission's imposition of mandatory arbitration violated the ADRA).

[38] *See also Comcast Corp., Petition for Declaratory Ruling that the America Channel is Not a Regional Sports Network*, Order, FCC Docket No. 07-172, 22 FCC Rcd. 17,938, 17,940 ¶ 4 n.13 (Sept. 25, 2007) (finding that arbitration decision was valid under the ADRA because Comcast could seek *de novo* review of the decision at the Commission).

[39] *Id.*

[40] S. Rep. No. 543, 101st Cong., 2d Sess. 1990, *reprinted at* 1990 U.S.C.C.A.N. 3931, 3942-43.

The mandatory arbitration provision in section 575 refers only to those arbitrations that are "binding," thus allowing agencies to require non-binding arbitration, in which either party may seek review of the decision.[41]

In conclusion, the Commission has both the authority and the obligation to grant the relief requested in this docket, and should do what is necessary to ameliorate the existing harm to consumers under its existing rules. We again express our appreciation from the announcement that the Commission will act on our petition and protect consumers from excessively high prices for video programming.

Respectfully submitted,

PUBLIC KNOWLEDGE

NEW AMERICA FOUNDATION

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[41] *TCR Sports Broadcasting Holding, LLP v. Time Warner Cable, Inc.*, Order on Review, DA Docket No. 08-2441, ¶ 52 (Oct. 30, 2008) ("As the Commission has previously found, the structure of the ADRA, the usage of the term 'arbitration' in other provisions of the ADRA to refer to 'binding arbitration,' and the statute's legislative history, indicate that Congress intended the term 'arbitration' in Section 573(a)(3) of the ADRA to refer only to binding arbitration. The ADRA's prohibition thus does not apply where, as here, the arbitration is non-binding, i.e. either party may seek de novo review of the arbitration decision."). The Commission also noted its ability to adopt mandatory arbitration requirements under the Cable Television Consumer Protection and Competition Act of 1992. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 07-29, 22 FCC Rcd. 17,791, 17,859 ¶ 113 (Sept. 11, 2007) ("we will continue to monitor developments in the marketplace and will, if necessary, revisit in the future whether to adopt a mandatory arbitration requirement").